

conclusion may be biased, may be prejudiced, may be grossly exaggerated or may even be wrong; it may be a conclusion I cannot and do not agree. But it is one which falls within the allowed limit of fair comment: it is a conclusion which a fair-minded person on the basis of those facts could have honestly arrived at. In my judgment the defendant has succeeded in establishing the four elements necessary to found his defence of fair comment."

Before us the plaintiff seeks to challenge these conclusions on the ground that the comment was not "fair." In support of his contention that the comment was not "fair" the plaintiff (a) again refers to the alleged misstatement of the defendant about 200 people leaving "with" the plaintiff, and (b) alleges that the defendant had not known of the plaintiff's departure from the hall when the comments were made. We have said enough on (a). As for (b) it arose in this way. The defendant in examination-in-chief stated that he had relied on two press reports in English when he made the comment. During cross-examination the plaintiff pointed out to the defendant that the two press reports contained nothing about the plaintiff's departure after making the speech. The defendant's memory was obviously jogged and his answer was that his branch party worker had told him about it. D.W.2, Seah Seng Kwang, was traced overnight and gave evidence the following day to the effect that he had told the defendant about the exodus following the departure of the plaintiff from the hall after the speech. Seah Seng Kwang's evidence was believed by Thean J. The plaintiff during the argument persistently refuses to accept that the defendant had a genuine and perfectly understandable lapse of memory and makes the bald and, in our view, quite unwarranted and unjustified assertion that Seah Seng Kwang's evidence was fabricated. Thean J. had the benefit of seeing and hearing the defendant and Seah Seng Kwang and, reading the notes of evidence, we are satisfied that Seah Seng Kwang had quite properly refused to be drawn into any issue not relevant to his testimony. This ground of appeal also fails.

Finally, the plaintiff submits that Thean J. was wrong in holding that he had failed to discharge the burden of proving that the defendant was actuated by express malice, the existence or otherwise of which is again a question of fact: see *Gatley on Libel and Slander* (8th edn.) para. 793. Thean J. found that the facts relied upon by the defendant in support of the plea of fair comment were true. Having found that there was a basis for the comments, Thean J. directed himself on the authority of *Horrocks v. Lowe*⁽⁶⁾ as to the honesty of the views asserted by the defendant. He found that "there was no ground for disbelieving (the

A defendant) that the belief (the defendant) entertained was a genuine and honest one." In our judgment there is no basis for attacking Thean J.'s finding that the defendant was not actuated by express malice.

B Before we part with this judgment we find it necessary to reiterate that as an appellate court we have to accord to findings of facts of a trial judge the greatest respect and ought not to disturb them unless we are satisfied that the trial judge had reached a wrong decision and that in the context of this case "any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusions": see the speech of Lord Thankerton in *Thomas v. Thomas* reported under the name of *Watt (or Thomas) v. Thomas*.⁽⁷⁾ These principles have been repeatedly applied by the Privy Council in several cases including *Khoo Sit Hoh v. Lim Thean Thong*,⁽⁸⁾ *Chow Yee Wah & Anor. v. Choo Ah Pat*⁽⁹⁾ and *Muthusamy v. Ang Nam Cheow*.⁽¹⁰⁾

E For these reasons the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Drew & Napier; J.B. Jeyaretnam & Co.*

SIM LIM FINANCE LTD. v. HIGHLIGHT INDUSTRY PTE. LTD. & ORS.

[O.C.J. (Lai Kew Chai J.) February 26, 1986]

[Singapore — Suit No. 3309 of 1980]

H *Practice and Procedure — Summons for direction — Delay over a lapse of 2 years and 2 months — Third defendants application to dismiss action for want of prosecution — Exercise of court's discretion — R.S.C. 1970, O. 25 r. 1(4).*

Limitation — Delay on plaintiffs' part in bringing action to trial — Non-expiry of limitation period — Court's discretion.

I The issue in this application is whether the plaintiffs' action should be dismissed summarily for want of prosecution. The plaintiffs commenced this action against three defendants, including the third defendants in which they claimed as against the third defendants damages for negligence, conspiracy to do a wrongful act, damages as constructive trustee knowingly and dishonestly disposing of the trust monies and fraud. The third defendants filed their

defence on February 16, 1981. No further step was taken by the plaintiffs over the long period of four years and two months.

On April 10, 1985, the plaintiffs filed and served the one-month notice of intention to proceed and on May 13, 1985, the plaintiffs filed the usual summons for directions. On July 2, 1985 the defendants filed an application for an order that the plaintiffs' action be dismissed for want of prosecution. The third defendants did not exercise their right to take out summons for directions themselves earlier but had waited and proceeded under the alternative limb in O. 25 r. 1(4).

Held, dismissing the third defendants' application: (1) the principles which a court should apply when considering whether an action should be dismissed for failure to comply in due time with the important steps for bringing an action to trial were clearly set out by Lord Diplock in *Birkett v. James*⁽¹⁾;

(2) a dismissal of the plaintiffs' action would be too draconian;

(3) in this case the court was not persuaded that a delay though flagrant and inordinate, would give rise to a substantial risk that it would not be possible to have a fair trial of the issues in the action nor was such delay likely to cause or had caused serious prejudice to the defendants;

(4) the plaintiffs should pay costs for this application.

Cases referred to:

- (1) *Birkett v. James* [1977] 2 All E.R. 801, 805.
- (2) *Greek City Co. Ltd. v. Demetriou* [1983] 2 All E.R. 921.
- (3) *Bailey v. Bailey* [1983] 3 All E.R. 495.
- (4) *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 M.L.J. 152.
- (5) *Vasudevan v. Damodaran* [1981] 2 M.L.J. 150.

CIVIL SUIT.

Liu Yuen Ming for the plaintiffs.

Pauline Tan (Miss) for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J. : On October 22, 1980 the plaintiffs commenced an action against three defendants, including the third defendants, in which they claimed as against the third defendants damages for negligence, conspiracy to do a wrongful act, damages as constructive trustee in knowingly and dishonestly disposing of the trust monies and fraud. On February 16, 1981 the defence of the third defendants was filed. No further step was taken by the plaintiffs over the long period of four years and two months. Then the plaintiff or those acting for them woke up from their long slumber and on April 10, 1985 the plaintiffs filed and served the one month notice of intention to proceed and on May 13, 1985 the plaintiffs filed the usual summons for directions which was fixed to

come up for hearing on July 29, 1985. In the interim period, the defendants taking the view that the periods of limitation of the causes of action of the plaintiffs would have expired on July 1, 1985 with all deliberate speed filed a summons-in-chambers on July 2, 1985, the following day, for an order that the plaintiffs' action be dismissed for want of prosecution.

After hearing the third defendants' application I dismissed it but I ordered the plaintiffs to pay costs of the application. Against that decision the third defendants have appealed and I now give my reasons. In view of my decision, I proceeded to hear the plaintiffs' summons for directions and made the usual orders.

The plaintiffs are and were at all material times a finance company and was, *inter alia*, in the business of financing hire purchase transactions. The first defendants, which have since been compulsorily wound up, were alleged to have hire purchased 74 sets of industrial sewing machines ("the sewing machines") under a hire purchase agreement dated December 26, 1978 under which the plaintiffs had financed the sum of \$105,000. Until the sewing machines were duly purchased by the first defendants from the plaintiffs under the hire purchase agreement, they were owned by the plaintiffs and were in the possession of the first defendants as hirers.

As required by a term of the hire purchase agreement, the first defendants had to insure the sewing machines against loss by fire. By a fire policy issued on March 24, 1979, in which the first defendants appeared as the insured party, the third defendants agreed to indemnify the first defendants up to \$140,000 against any loss of the sewing machines by fire. Within the box provided in the insurance policy for "the interest on property insured," there was expressly typed in the statement that the property insured, including the sewing machines, was the property of the insured "or held by them in trust or on commission for which they are responsible, whilst contained in the building ... situate (at) No. 315 Alexandra Road, 2nd Floor, Singapore"

On July 1, 1979 a fire broke out in the building and, as the plaintiffs claimed, all the sewing machines were destroyed, although the third defendants claimed in their defence that not all of them were destroyed and that the loss value attributable to the destruction by fire of the sewing machines was only \$44,461.37 even if the plaintiffs had any interest in them, which the third defendants denied.

Four days after the fire, the plaintiffs put the third defendants on notice of their claims as owners of the sewing machines under the hire purchase agreement. They wrote to the first defendants requiring them to give written instructions to the third defendants to pay out the insurance monies directly to the plaintiffs and a carbon copy of the letter, which set out the interest of the plaintiffs in the sewing machines, was extended to the third defendants. There was no response from the third defendants. So by a letter dated November 12, 1979 the plaintiffs through their solicitors demanded the payment of \$140,000 from the third defendants. It was a long letter in which the interest of the plaintiffs was again set out and by which the third defendants was informed that the plaintiffs had been appointed under the hire purchase agreement as the agent to collect the insured sum and to give a valid receipt. Again, the third defendants did not respond.

In March 1980 the plaintiffs sued the first defendants and by August 1980 they obtained judgment in Suit 638 of 1980 under which it was declared that the plaintiffs were entitled to receive the insurance monies from the third defendants. The third defendants were not a party in that suit and the judgment was therefore not binding on them. The plaintiffs gave the third defendants notice of the judgment obtained by them against the first defendants and again demanded payment which was not made and they instituted these proceedings against the third defendants.

Some reference has been made to the allegations in the statement of claim. After setting out the knowledge of the third defendants that the sewing machines were trust property, as spelt out in the fire policy itself, and that the plaintiffs had immediately after the fire casualty made a claim to the insured monies, the plaintiffs alleged in paragraph 8 of the statement of claim that during a period after the fire the first defendants, the second defendants, its managing director, and the representative of the third defendants "conceived and carried out a fraudulent and dishonest design" to ignore the lawful claims of the plaintiffs and to pay out the insurance monies to the first defendants. This serious allegation also appears as a claim of conspiracy in paragraph 14 of the statement of claim.

Paragraph 10 of the statement of claim was the alternative claim in these terms:

"If contrary to the allegation of the abovesaid paragraph 8 any of the defendants (with or without others) who assisted in the aforesaid design did not know that it was fraudulent

A and dishonest, such defendants nevertheless knew of circumstances which would have indicated to an honest and reasonable person (including a company) that such a design was being committed, alternatively knew of circumstances which would have put such a person on inquiry whether it was being committed but nevertheless failed to make any or any reasonable such inquiry.

B Although more particulars of the serious allegations of fraud and of the claims of fraudulent breaches of trust against the third defendants as constructive trustees, in which trust monies were allegedly involved, would have been most helpful, I was compelled to take the view that strictly on a reading of the pleadings the claims of fraud and for the reliefs of tracing, payment out and damages against the third defendants as constructive trustees were set out sufficiently as separate causes of action to which the third defendants had, in any case and notwithstanding the paucity of particulars, filed their defence. Perhaps, I should say that I do not, as I should not, say anything about the merits of these allegations which will properly be for the trial judge.

E So far as the insurance monies of \$140,000 are concerned, the questions which will arise in this case are whether these were trust monies and whether the third defendants had become a constructive trustee and therefore liable to account to the plaintiffs for that sum. The relevant law will be the law of constructive trusts. I understand the plaintiffs' allegations on this aspect of their claims to amount to this: that the third defendants knew or had notice that the insured sum would upon the casualty happening, become trust monies inasmuch as the sewing machines were trust property and that they had held the insured sum or dealt with it in a manner inconsistent with the trust: see *Snell's Principles of Equity* (28th edn.) pp. 194 & 195 and the three cases cited under footnote 16.

H Apart from the allegations of fraud, liabilities as constructive trustees, conspiracy to do a wrongful act, the plaintiffs had also alleged negligence.

I On the bases of these several causes of action the plaintiffs claimed as against the third defendants (1) damages for negligence, (2) damages for conspiracy, (3) all such orders as may be just for following or tracing of property by the plaintiffs, (4) all other necessary accounts, directions and inquiries and other reliefs as to interests and costs. The third and fourth named reliefs relate to the alleged liabilities of the third defendants as constructive trustees to account to the plaintiffs.

I will now have to turn to the defences filed. Apart from acknowledging the receipt of the claims from the plaintiffs or their solicitors, every allegation in the statement of claim was denied. On the positive side, the third defendants contended that they were entitled to pay the insured monies to the first defendants directly and that, alternatively, "such payments were in effect void for the reasons hereinafter specified" (para 8 of the defence). In paragraph 15, the third defendants went on to assert that the sewing machines were also the subject matter of hire purchase agreements with Sin Thai Hin Trading (Private) Limited and Nanyang Finance Limited, that not all the 74 sets were destroyed by the fire and that in any case the interest of the plaintiffs was limited to the sum of \$44,461.37 against which there should be a set-off of \$35,000 which had been paid by the first defendants, the insured, to the plaintiffs. The third defendants specifically pleaded that they had learned of these facts subsequent to the fire.

By paragraph 16 of the defence it was also alleged that the policy was null and void by reason of the first defendants' non-disclosures of the following material facts or falsehoods, namely (1) that the self-same sewing machines were under three hire purchase agreements with three owners as aforesaid; (2) that the sewing machines were also insured with Cosmic Insurance Corporation Limited and AFIA; (3) that there was a previous fire at the same premises; (4) that there was no mortgage or charge on the property; and (5) that there was no other insurance in force on the same property with any other company.

Having set out the history of the proceedings in this matter, the factual background giving rise to the disputes and the summarised nature of the claims and defences, I now turn to the application before me to dismiss the action for want of prosecution. The third defendants did not exercise their right to take out a summons for directions themselves earlier but had waited and proceeded under the alternative limb in Order 25 sub-rule 1(4) which provided thus:

"If the plaintiff does not take out a summon for directions in accordance with the foregoing provisions of this Rule, the defendant...may do so or apply for an order to dismiss the action."

What I was empowered to do was provided in the next sub-rule which stated:

"On an application by a defendant to dismiss the action under paragraph (4) the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions."

A The principles which a court should apply when considering whether an action should be dismissed for failure to comply in due time with the important steps for bringing an action to trial were clearly set out by Lord Diplock in *Birkett v. James*⁽¹⁾ in the following terms:

B "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

D Although ground (1) above was not relied upon by the third defendants in their application before me, I was of the view that the distinction between the two grounds, though related, had an important bearing in this case. The distinction drawn by the reported cases related to the subsequent fate of the causes of action pleaded in actions which had been dismissed on either ground (1) or ground (2) stated above. If an action was dismissed under ground (1) then a second action by the plaintiff pleading the same cause of action could be dismissed as abuse of process. On the other hand, if the first action was dismissed on ground (2), a second action by the same plaintiff raising the same cause of action, if filed within the period of limitation, could not be dismissed as abuse of process. In the result, it has been observed that where the period of limitation has not yet lapsed, it would be exceptional to dismiss an action on ground (2).

G Lord Diplock recognised this distinction when in *Birkett v. James* he said at p. 808:

H "I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

I Goulding J. in *Greek City Co. Ltd. v. Demetriou*⁽²⁾ felt himself bound to bear in mind and apply the distinction in that case, although the defendant was suffering losses and was prejudiced while the plaintiff was dragging his feet in the prosecution of its claims. The English Court of Appeal in *Bailey v. Bailey*⁽³⁾ also recognised the distinction.

Not all the causes of action in the instant case would expire six years from the date on which the right of action accrued. In respect of the claims of fraud and fraudulent breaches of trust no period of limitation as prescribed by the Limitation Act, (Cap. 10) would apply: see section 22(1) of the Act. Even with regard to the plaintiffs' claims of negligence and the tort of conspiracy, I was not altogether satisfied that the period of limitation of six years had expired on July 1, 1985. I did not have, for example, the allegations as to when the breach of duty had taken place nor the date when the conspiracy was agreed. Although the plaintiffs or their lawyers had failed to take out the summons for directions over a lapse of four years and two months, the third defendants did not do so, although they could have done so. After the plaintiffs had served the notice of their intention to proceed in May 1985 there was not a whiff of any objection from the third defendants who apparently waited for the period of limitation to expire, or so they thought, before they applied to dismiss the action for want of prosecution. Seeing that not all the causes of action pleaded in this case had expired; that such of the causes of action which had expired (if they did, as to which I had some doubt) only on the day before the application to dismiss the action; and that some two months earlier the plaintiffs had given notice of their intention to proceed which they did by filing the summons for directions, I thought in the exercise of my discretion that a dismissal would be too draconian.

I had a second reason for not dismissing the action. I was not persuaded that the delay, though flagrant and inordinate, would give rise to a substantial risk that it would not be possible to have a fair trial of the issues in the action. Nor was I persuaded that such delay was likely to cause or had caused serious prejudice to the third defendants. The issues in this case are quite clear from my earlier references to and analysis of the pleadings. In fact, the plaintiffs' evidence would probably be dependent on oral testimonies; whereas those of the third defendants would largely be documentary or would have been documented. Contrary to the bald affidavit assertions made on behalf of the third defendants, I could not see how the defences of the third defendants would materially depend on the oral testimonies of the officers of the insured, the first defendants, or the evidence of the second defendants. At any rate it was somewhat speculative to say that these witnesses might not be available, if they had to be called. Further, it was alleged on behalf of the third defendants that they had a right of contribution or indemnity

A from the first defendants which were wound up if the plaintiffs were to succeed, which they lost by reason of the delay of the plaintiffs. I was of the view that whatever that right was, the third defendants had ample time since the commencement of the action and could have taken out third party proceedings against the first defendants. If the third defendants had failed to do so within the period of limitation, the direct and effective cause of the loss was the third defendants' failure to take out such third party proceedings and the loss could not be laid at the doorsteps of the plaintiffs.

C Counsel for the third defendants relied on *Toh Hock Thye & Ors. v. Toh Chwee Biow*,⁽⁴⁾ a decision of the Federal Court of Malaysia which affirmed the principles of law governing a dismissal of an action for want of prosecution enunciated by a differently constituted Federal Court of Malaysia in the earlier case of *Vasudevan v. Damodaran*.⁽⁵⁾ The law was clearly and succinctly spelt out in the two cases: see in particular the judgment of Abdoolcader J. (as he then was) who delivered the judgment of the Federal Court in the latter case at pp. 150, 151. The Federal Court of Malaysia received into Malaysia the principles set out by Lord Diplock in *Birkett v. James* and applied the principles to the facts of the two cases and such applications are instructive examples for the guidance of our courts. In the instant case, I did the same thing and applied the principles to the particular facts of this case.

Order accordingly.

Solicitors: *Lim, Ganesh & Liu; Lee & Partners.*

THE STRAITS TIME PRESS (1975) LTD. v. THE WORKERS' PARTY & ANOR.

[O.C.J. (Thean J.) April 24, 1986]

[Singapore — Suit No. 745 of 1982]

Defamation — Libel — Press release made by first defendant signed by second defendant — Whether words complained in press release were defamatory in their natural and ordinary meaning — Fair comment — Defendants bearing part of costs.

In this case, the plaintiffs, proprietors and publishers of "*The Straits Times*", brought an action for defamation against the first defendant, a political party and the second defendant, J.B. Jeyaretnam, who was and is the Secretary-General of the first defendant.